

EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

-----X
RONALD CANTOR, IVAN SNYDER,
JAMES A. SCARPONE, as Trustee of
the MAFCO LITIGATION TRUST,
Plaintiffs,

C.A. No.
97-586 (KAJ)

vs.

RONALD O. PERELMAN, MAFCO
HOLDINGS, INC., MACANDREWS &
FORBES HOLDINGS, INC., ANDREWS
GROUP INCORPORATED, WILLIAM C.
BEVINS AND DONALD G. DRAPKIN,
Defendants.

-----X
VIDEOTAPED DEPOSITION OF ROBERT W. HOLTHAUSEN
THURSDAY, APRIL 20, 2006

HUDSON REPORTING & VIDEO, INC.

124 West 30th Street, 2nd Fl.

New York, New York 10001

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1
2 Videotaped deposition of ROBERT W.
3 HOLTHAUSEN taken in the above-entitled matter
4 before Mark Iuzzolino, a Certified Shorthand
5 Reporter (License No. X101103) and Notary Public
6 of the State of New Jersey, taken at the offices
7 of FRIEDMAN, KAPLAN, SEILER & ADELMAN, LLP, 1633
8 Broadway, New York, New York 10019, on THURSDAY,
9 APRIL 20, 2006, commencing at 10:05 a.m.
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2 THE VIDEOGRAPHER: This is the beginning
3 of tape No. 1 in the videotape deposition of
4 Robert Holthausen being taken by counsel for
5 plaintiff pursuant to agreement in the case of
6 Cantor et al., plaintiffs, versus Perelman et al.,
7 defendants, in the US District Court for the
8 District of Delaware, case number 97-586. This
9 deposition is being held at the law offices of
10 Friedman Kaplan, located at 1633 Broadway, New
11 York City, New York, on Thursday, April 20, 2006,
12 at the time indicated on the video screen, which
13 is approximately 10:05 a.m. At this point we're
14 on the video record. My name is Bill Poznanski,
15 and I'm the videographer working here today for
16 Hudson Reporting Services. The court reporter is
17 Mark Iuzzolino, also in association with Hudson.
18 At this point I would ask counsel present to
19 please audibly introduce themselves with the name
20 of their firm and who they represent, starting
21 with the attorney taking the deposition.
22 MR. GOLDWATER: Andrew Goldwater,
23 Friedman Kaplan Seiler & Adelman. I'm counsel for
24 the plaintiffs.
25 MR. GOTTFRIED: Jonathan Gottfried, also

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1
2 APPEARANCES:
3
4 FRIEDMAN, KAPLAN, SEILER & ADELMAN, LLP
5 1633 Broadway
6 New York, New York 10019
7 BY: ANDREW W. GOLDWATER, ESQ.
8 AND
9 JONATHAN GOTTFRIED, ESQ.
10 Attorneys for the Plaintiffs
11
12 SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
13 One Rodney Square
14 Wilmington, Delaware 19899-0636
15 302-651-3000
16 BY: THOMAS J. ALLINGHAM, II, ESQ.
17 AND
18 BRIAN G. LENHARD, ESQ.
19 Attorneys for the Defendants
20
21 ALSO PRESENT:
22
23 MACANDREWS & FORBES HOLDINGS, INC.
24 STEVEN L. FASMAN
25 BILL POZNANSKI, VIDEOGRAPHER - HUDSON REPORTING

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1
2 with Friedman Kaplan.
3 MR. ALLINGHAM: Tom Allingham, Skadden
4 Arps, Slate, Meagher & Flom, LLP representing the
5 defendants.
6 MR. LENHARD: Brian Lenhard with Skadden
7 Arps also.
8 THE VIDEOGRAPHER: At this point I would
9 ask the court reporter to please swear in the
10 witness.
11 ROBERT W. HOLTHAUSEN
12 having been first duly sworn, was examined and
13 testified as follows:
14
15 DIRECT EXAMINATION
16 BY MR. GOLDWATER:
17 Q. Good morning, Mr. Holthausen. I'm
18 Andrew Goldwater. I'm an attorney for the
19 plaintiffs. I'll be asking you questions today.
20 If I ask you a question that is unclear to you,
21 please let me know, and I'll try to clarify or
22 rephrase the question. Otherwise, I'll assume
23 that you -- that we're on the same wave length.
24 A. That's fine.
25 Q. Are you still a professor at the Wharton

2 (Pages 2 to 5)

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1 Robert W. Holthausen
 2 School?
 3 A. Yes, I am.
 4 Q. And what are your primary areas of
 5 professional expertise?
 6 A. My primary areas of professional
 7 expertise? I've done a lot of work on corporate
 8 valuation. I've done a lot of work on corporate
 9 governance. I've done a lot of work on bond
 10 ratings and bond rating agencies. In working in
 11 corporate valuation, you get into lots of issues
 12 about capital structure, default, issues of that
 13 ilk. I've written about compensation of
 14 executives. I've written about block trades. I
 15 don't know how long you want me to go on, but, I
 16 mean, I've done a lot of work in a lot of
 17 different areas over the last 25 years.
 18 Q. Okay. Are there -- I leave it up to
 19 you. I can't judge for you. But are there any
 20 other areas where you have professional expertise?
 21 A. Well, I've done some -- when you say
 22 "professional," do you mean academic, or do you
 23 mean -- do you want to know about consulting
 24 things, or what?
 25 Q. It encompasses the entirety of your

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1 Robert W. Holthausen
 2 career.
 3 A. Okay, okay. So I've done work on --
 4 I've done consulting work on compensation. I've
 5 done consulting work where I've helped hedge funds
 6 create trading rules. I've helped a small
 7 start-up company raise capital. I helped a
 8 publicly traded company that was in a distressed
 9 debt situation try to figure out how to resolve
 10 that distressed debt situation. I helped a
 11 publicly traded company understand what happened
 12 to them when they had engaged in -- they had put
 13 in a particular incentive scheme, and how
 14 management responded to that and why investment
 15 changed dramatically within the firm. Those are
 16 the things that come to the -- to my head right
 17 now.
 18 Q. Are you an expert in the area of damages
 19 analysis?
 20 A. Yes. I've done work on damages analysis
 21 before.
 22 Q. What work have you done in that area?
 23 A. I've been involved in a number of cases
 24 where I either had to talk about -- compute
 25 damages or talk about the theory of damages. This

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1 Robert W. Holthausen
 2 is a case, obviously, where I'm working on that.
 3 The prior case that I worked on was a case,
 4 Equimed versus Ernst & Young, which is on my
 5 exhibit, which is also a damages case. I've
 6 worked on cases involving insurance companies that
 7 was a damage case. I worked on a trucking company
 8 that involved a damage case. I'm working
 9 currently on another matter that's a damages case.
 10 There's probably some others in there, too. I've
 11 been involved in a number of damages cases at this
 12 point.
 13 Q. Okay. Obviously I did see the Equimed
 14 case on your CV. When did you work on the
 15 insurance company case?
 16 A. That's probably 20 years ago, 15 to 20
 17 years ago.
 18 Q. And were you retained as an expert
 19 witness in that case?
 20 A. Yes, I was.
 21 Q. Who was the law firm you worked with,
 22 lawyer?
 23 A. I don't remember that.
 24 Q. Do you remember the name of the party?
 25 A. Monarch Insurance, and Ernst & Young was

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1 Robert W. Holthausen
 2 involved in that.
 3 Q. As an adversary of Monarch Insurance?
 4 A. Ernst & Young was being sued because of
 5 a matter related to Monarch Insurance.
 6 Q. I see. So who was the entity that
 7 retained you? Was it Ernst & Young?
 8 A. Ernst & Young, yes.
 9 Q. And what was the subject of your expert
 10 report or testimony in that case?
 11 A. We're dredging up ancient history that I
 12 haven't thought about for a long time. If I
 13 remember correctly, there were -- you know, I
 14 don't remember the details enough to really feel
 15 comfortable. I know it had something to do with
 16 some announcement and trying to figure out what
 17 the price effects were associated with the
 18 announcement. I just don't remember. It's so
 19 long ago, I just don't remember the details that
 20 well.
 21 Q. Okay. In the trucking company case,
 22 when did you do your work on the trucking company
 23 case?
 24 A. That was more recently, but it was
 25 probably, you know, 15 years ago instead of 20

3 (Pages 6 to 9)

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1 Robert W. Holthausen
 2 years ago.
 3 Q. Who was the lawyer or law firm that
 4 retained you?
 5 A. Sidley Austin.
 6 Q. And do you remember the name of the
 7 party on whose behalf you were working?
 8 A. I think it was called "Circle Express."
 9 Q. Were you retained as an --
 10 A. Well, actually, I was retained by a
 11 public accounting firm. May have been Ernst &
 12 Young again, but I'm not sure about that. But the
 13 entity, it involved Circle Express, I think.
 14 Q. I see. And the party in the dispute
 15 that you were working on behalf of may have been
 16 Ernst & Young?
 17 A. It may have been, but I'm not sure.
 18 Q. And do you remember what the subject of
 19 your testimony was in that matter?
 20 A. The subject was -- had to do with a
 21 restatement of financial statements that took
 22 place. And if I remember correctly -- and, again,
 23 this is pretty hazy. If I remember correctly, the
 24 bondholders were suing, stating that if the
 25 earnings had not been -- if the earnings had been

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1 Robert W. Holthausen
 2 reported appropriately to begin with, then the
 3 bond rating that the bonds would have gotten would
 4 have been lower and, therefore, the interest rate
 5 would have been higher. And so the issue was:
 6 What was the magnitude or what was the impact of
 7 that earnings restatement on the likelihood that
 8 the rating agencies would have taken a different
 9 view?
 10 Q. Do you have any recollection of what
 11 court that matter was pending in or tribunal? I
 12 don't know if it was an arbitration or a lawsuit.
 13 A. No. It was a lawsuit, but it never -- I
 14 was never deposed in that case.
 15 Q. Do you happen to remember which court it
 16 was in?
 17 A. (The witness shakes head in the
 18 negative.)
 19 Q. Okay. Do you happen to remember which
 20 court the Monarch Insurance matter was in?
 21 A. No, I do not. Sorry. I'm shaking my
 22 head. I have to speak.
 23 Q. And you mention the Equimed matter that
 24 I do see on your CV. Who retained you in that
 25 case?

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1 Robert W. Holthausen
 2 A. Ernst & Young.
 3 Q. And who's the lawyer or law firm that
 4 you were --
 5 A. Drinker Biddle.
 6 Q. And do I understand correctly that
 7 that's an arbitration?
 8 A. That's correct.
 9 Q. Okay. And what was -- were you retained
 10 as an expert witness?
 11 A. Yes, I was.
 12 Q. Is that by Ernst & Young?
 13 A. Yes.
 14 Q. And what was the subject matter of your
 15 opinions that you offered in that case?
 16 A. The subject matter had to do with
 17 whether or not -- well, Ernst & Young in that
 18 particular case withdrew from an engagement after
 19 a protracted period of time. And the issue was:
 20 Was there any damage to Equimed because Ernst &
 21 Young had withdrawn from the case? And they were
 22 alleging things like, there was a potential
 23 purchase of Equimed that was going to take place
 24 or a portion of Equimed that was going to take
 25 place, and plaintiffs complained -- contended that

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1 Robert W. Holthausen
 2 when Ernst & Young withdrew, that that transaction
 3 fell apart.
 4 Q. And what was your particular opinion
 5 offered on what subject?
 6 A. In addition, there was contentions that
 7 they were denied access to capital markets because
 8 of the withdrawal of Ernst & Young from the audit.
 9 And so basically, I did an analysis of whether or
 10 not they were -- whether Ernst & Young's
 11 withdrawal from the case had any impact on their
 12 ability to raise capital or not, either equity or
 13 debt. They were delisted by the NASDAQ. There
 14 was a contention that the reason they were
 15 delisted was because of Ernst & Young. That was
 16 not true. They would have been delisted anyway.
 17 So those were the kinds of things that I did. So
 18 I did basically both -- address liability issues
 19 as well as damage issues in that case.
 20 Q. Have you ever testified at trial as an
 21 expert witness?
 22 A. By "trial," you don't mean arbitration,
 23 but you mean actual trial?
 24 Q. Okay, we'll start there. That's -- yes,
 25 have you ever testified in a court?

4 (Pages 10 to 13)

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1 Robert W. Holthausen
 2 A. Well, I've testified in an arbitration.
 3 I never testified in a court of law.
 4 Q. I see. So no judge has had occasion to
 5 pass on your testimony in any way --
 6 A. Correct.
 7 Q. -- because you haven't had the occasion.
 8 Okay.
 9 MR. ALLINGHAM: Excuse me.
 10 Mr. Goldwater has at tendency to finish up his
 11 questions slowly. You've got to let him finish
 12 before you --
 13 A. I'm sorry. Thanks.
 14 Q. Okay. Over the last ten years, what
 15 percentage of your professional time have you
 16 spent on -- in the area of damages analysis?
 17 A. I have no idea what percentage of my
 18 time. I don't work on cases that often, so it's
 19 not a huge percentage of the time. I mean, I
 20 think about valuation issues all the time, and
 21 damages are basically valuation issues. So to
 22 that extent, I teach valuation courses. I'm
 23 always talking about valuation. And so to the
 24 extent that damages are, in large part, a
 25 valuation exercise or often a valuation --

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1 Robert W. Holthausen
 2 valuation exercise, you know, I think about those
 3 issues all the time.
 4 Q. Okay. Just in the area of dispute work
 5 that you've done, putting aside -- I take your
 6 point about how valuation may have relevance to
 7 the dispute-related work you've done. What
 8 percentage of your time in the last ten years have
 9 you spent on dispute work on average? Is it less
 10 than 10 percent of your time?
 11 A. It's probably 10 percent or less, I
 12 would say, yes.
 13 Q. Have you ever published an article on
 14 damage analysis?
 15 A. No, I've never published an article
 16 directly on damages analysis.
 17 Q. Have you ever spoken at a professional
 18 event, you know, whether it be a conference or
 19 seminar, on damages analysis?
 20 A. No.
 21 Q. Have you ever attended a professional
 22 event on damages analysis?
 23 A. Not to my recollection, no.
 24 Q. Have you ever taught a class on damages
 25 analysis?

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1 Robert W. Holthausen
 2 A. Well, again, I teach a class on
 3 valuation all the time, and we talk about
 4 valuation issues, and we talk about issues that
 5 are certainly related to damages, but I've never
 6 talked specifically, for example, in a law school
 7 about damages analysis.
 8 Q. Okay. Or any other kind of school, I
 9 take it?
 10 A. Correct. It's not in the curriculum of
 11 the business school.
 12 Q. Okay. Have you ever taken a class on
 13 damages analysis?
 14 A. No, I've never taken a class on damages
 15 analysis, but I've read work on damages analysis.
 16 Q. I'm sorry. You've read work on --
 17 A. I've read work on damages analysis.
 18 Q. What work have you read?
 19 A. Well, there's an article by Fisher that
 20 I've read and somebody else, but I don't remember
 21 who the other author is. It has Janice Joplin in
 22 the title. I don't remember the other work that
 23 I've read on damages analysis off the top of my
 24 head.
 25 Q. Okay. Is it your practice to make an

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1 Robert W. Holthausen
 2 effort to keep informed on literature or articles
 3 on the subject of damages analysis?
 4 A. I subscribe to journals like the Journal
 5 of Law and Economics, and so there are articles
 6 that are written in there periodically about
 7 damages analysis.
 8 Q. Anything else?
 9 A. Not off the top of my head.
 10 Q. Okay, okay. Do you believe that you're
 11 qualified to serve as an expert on the subject of
 12 damages in this particular lawsuit?
 13 A. Yes.
 14 Q. Okay. And why is that?
 15 A. I believe I understand the theory of
 16 damages, and I believe I have expertise in the
 17 matters that are being contended here.
 18 Q. How did you come to be retained as an
 19 expert on damages issues, specifically in rebuttal
 20 to Mr. Baliban's report?
 21 A. I was sent an e-mail, I believe, by
 22 Miguel Herce -- last name is spelled H-e-r-c-e --
 23 saying that the Marvel case was back in play and
 24 that he wondered if I would be available to have a
 25 conversation with Mr. Allingham.

5 (Pages 14 to 17)

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1 Robert W. Holthausen
 2 A. No. I hadn't seen any reports, so there
 3 was nothing for me to express an opinion about.
 4 Q. And was there any discussion of your
 5 suitability to serve as a rebuttal expert on
 6 damages?
 7 A. No, there was not.
 8 Q. Okay. If I'm understanding correctly,
 9 there was just an initial e-mail from Mr. Herce,
 10 and then in the next call with Mr. Allingham you
 11 were retained? It was the only pre-retention
 12 communications?
 13 A. To my recollection, that's it.
 14 Q. Okay. How were you compensated for your
 15 work as an rebuttal expert?
 16 A. On an hourly basis.
 17 Q. Okay. Is that 800 an hour?
 18 A. Yes, it is.
 19 Q. How much are your charges so far on your
 20 work as a rebuttal expert?
 21 A. I think ballpark, it was around \$70,000.
 22 Q. And have you been paid?
 23 A. No, I have not.
 24 Q. Okay. And is any part of your payment
 25 contingent in any way?

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1 Robert W. Holthausen
 2 A. No.
 3 MR. GOLDWATER: May I have this marked
 4 as Holthausen Exhibit 1?
 5 (Expert report of Robert W. Holthausen
 6 is marked as Holthausen Exhibit 1 for
 7 Identification.)
 8 Q. Mr. Holthausen, I show you what we've
 9 marked as Holthausen Exhibit 1 and ask you to
 10 please take a look at that and tell me if that is
 11 your rebuttal report in response to Mr. Baliban's
 12 report.
 13 A. Yes, it is.
 14 Q. Okay. And are the opinions in your
 15 report the opinions you intent to offer at trial?
 16 A. These are the opinions that I have at
 17 this point in time. There's a lot of depositions
 18 being taken right now. I have not read those
 19 depositions, so I do not know what's in those
 20 depositions. Reading those depositions could
 21 presumably cause me to want to do additional work
 22 or amend my opinions in some way or augment my
 23 opinions in some way.
 24 Q. Well, being as this is my last
 25 opportunity to speak to you between now and the

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1 Robert W. Holthausen
 2 trial, as you sit here today, are there any other
 3 opinions other than the ones in your report that
 4 you intend to offer at trial?
 5 MR. ALLINGHAM: Objection. Asked and
 6 answered.
 7 Q. As you sit here today, are you aware of
 8 any other opinions that you plan to offer at trial
 9 beyond what is reflected in your report?
 10 MR. ALLINGHAM: Same objection.
 11 A. I think I've said that I might augment
 12 my opinions based upon what other people have
 13 said.
 14 Q. I have heard you say that.
 15 A. Okay.
 16 Q. Today do you know of any other opinions
 17 you plan to offer at trial other than what is in
 18 your report?
 19 A. The one matter I've thought about since
 20 then that probably -- and I haven't thought about
 21 how to do it yet. One of the things in computing
 22 a -- the expected cost of financial distress is
 23 that those financial distress costs are going to
 24 occur in the future. And it would be appropriate
 25 to think about present-valuing those financial

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1 Robert W. Holthausen
 2 distress costs. And I haven't thought a lot about
 3 how you would do that. It's not clear when the
 4 financial distress costs would occur, but it seems
 5 to me that calculating the present value of those
 6 financial distress costs would be something that
 7 would be appropriate to do. My report doesn't
 8 reflect doing that present-value calculation, and
 9 I haven't figured out yet exactly how you would do
 10 that present-value calculation.
 11 Q. What is the basis for your statement
 12 that "financial distress costs are going to occur
 13 in the future"?
 14 A. Well, there's a period where the actual
 15 financial distress is going to be incurred
 16 potentially, and it may not occur at the time
 17 that -- you know, when you're standing at some
 18 particular point in time, say February 15, 1994,
 19 the financial distress hasn't occurred yet. And
 20 the issue would be: How you think about present
 21 valuing something which may occur in the future
 22 back to the current time period?
 23 Q. When we sit at trial and we are thinking
 24 about financial distress costs incurred by Marvel,
 25 are we talking about costs that have already been

7 (Pages 22 to 25)

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1 Robert W. Holthausen
 2 incurred or costs that will be incurred in the
 3 future?
 4 MR. ALLINGHAM: Would you just read the
 5 question back for me?
 6 (Counsel requests the reading of the
 7 following testimony:
 8 "QUESTION: When we sit at trial and we
 9 are thinking about financial distress costs
 10 incurred by Marvel, are we talking about costs
 11 that have already been incurred or costs that will
 12 be incurred in the future?")
 13 MR. ALLINGHAM: I object to the form of
 14 the question.
 15 THE WITNESS: Could you read it again?
 16 (Counsel requests the reading of the
 17 following testimony:
 18 "QUESTION: When we sit at trial and we
 19 are thinking about financial distress costs
 20 incurred by Marvel, are we talking about costs
 21 that have already been incurred or costs that will
 22 be incurred in the future?")
 23 A. I guess your question isn't clear to me.
 24 I wonder if you could rephrase it.
 25 Q. I'll try to. Is it -- do you have a

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1 Robert W. Holthausen
 2 the note issuance, you would want to calculate the
 3 present value of those costs to figure out what
 4 the costs were at the time of the note issuance.
 5 So, for example, if we were to talk about the
 6 Marvel III notes, which were issued on
 7 February 15, '94, what was the expected value of
 8 those, that would be a present-value calculation.
 9 I have an expected-value calculation in there, but
 10 I haven't calculated the present value of the
 11 financial distress costs.
 12 Q. Is there anything else that is not
 13 already in your report that you expect to offer as
 14 an opinion at trial other than what you just told
 15 me?
 16 A. There's a couple of things that I have
 17 done since the report that have not altered my
 18 opinions in any --
 19 THE REPORTER: Have not? I couldn't
 20 hear because of the squeak. That have not?
 21 A. -- altered my report that I have done
 22 since then.
 23 Q. What are those things?
 24 A. And --
 25 Q. Oh, I'm sorry.

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1 Robert W. Holthausen
 2 view as to whether the financial distress costs
 3 that Mr. Baliban opines were suffered by Marvel
 4 are costs that Marvel has already suffered or that
 5 it has yet to suffer?
 6 MR. ALLINGHAM: I object to the form of
 7 the question. I object to the form of the
 8 question. I'll --
 9 Q. I'll rephrase it. When did Marvel
 10 sustain financial distress costs?
 11 A. Well, it's not clear that Marvel did
 12 sustain substantial financial distress costs, but
 13 my calculation of the financial distress cost is
 14 based upon calculating the expected financial
 15 distress cost that might have occurred associated
 16 with the issuance of the holding company notes.
 17 Those financial distress costs haven't been
 18 incurred at the time the notes are issued.
 19 Q. So --
 20 A. There is some probabilistic expectation
 21 that they might occur based upon certain
 22 assumptions, which I'm sure we'll get into later
 23 on. If those occur in the future and you're
 24 calculating sort of what the expected value of
 25 those financial distress costs are at the time of

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1 Robert W. Holthausen
 2 A. That's okay. One thing I did was, I
 3 looked at whether or not there were any
 4 significant announcement effects on any of the
 5 days that I had talked about in my report. And
 6 basically, there were no significant announcement
 7 effects on any of the days in my report until we
 8 got to October 8 of 1996.
 9 MR. ALLINGHAM: Could I interrupt for a
 10 minute, Andrew? Would you be willing to swap
 11 chairs? because it's squeaking a lot, and I can
 12 tell it's tough on the court reporter.
 13 MR. GOLDWATER: Sure.
 14 THE VIDEOGRAPHER: Should we go off the
 15 record?
 16 MR. ALLINGHAM: No, no. It's fine.
 17 A. And all that did was buttress my
 18 opinions or fortify my opinions. Another thing I
 19 did was, I did some sensitivity analysis to my
 20 bankruptcy probability model to see whether or not
 21 the financial distress costs were sensitive to
 22 varying inputs. I concluded that, based upon
 23 reasonable variation in those assumptions, the
 24 expected financial distress costs are not very
 25 sensitive to alternative estimates.

8 (Pages 26 to 29)

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1 Robert W. Holthausen
 2 Q. Anything else?
 3 A. The only other thing that I did was, I
 4 looked to see whether there were any analyst
 5 reports that came out between -- if I get these
 6 dates right -- October 17 of '96 and November 12
 7 of '96 to see whether they discussed the
 8 announcement that the Andrews Group had made on
 9 October 17 regarding the potential equity
 10 infusion. And I found a series of analyst reports
 11 that also buttress my contention that the market
 12 was aware of the potential issues associated with
 13 the holding company notes prior to the November 12
 14 announcement.
 15 Q. Is that all?
 16 A. Yes.
 17 MR. ALLINGHAM: Andrew, in talking to
 18 Professor Holthausen, I heard the same thing that
 19 you heard just now yesterday. And if you're
 20 interested, I asked him for copies of the analyst
 21 reports that he talked about, and I have them for
 22 you if you want them since they're not identified
 23 on whatever the exhibit is that talks about
 24 materials relied upon.
 25 MR. GOLDWATER: Yes, that would be fine.

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1 Robert W. Holthausen
 2 We would like to see --
 3 MR. ALLINGHAM: You want them now? You
 4 want them on a break?
 5 MR. GOLDWATER: I don't want them this
 6 moment.
 7 Q. Professor Holthausen, going back a few
 8 questions and answers ago, when you were telling
 9 me about financial distress costs that you were
 10 saying were going to occur in the future, and
 11 maybe there should be a present valuing of certain
 12 costs, somewhere in that answer you mentioned that
 13 it wasn't clear whether Marvel experienced
 14 financial distress. Do you remember that?
 15 A. Uh-huh.
 16 Q. Okay. Are you --
 17 A. No, no, no. I didn't say whether they
 18 experienced financial distress.
 19 Q. Then maybe I misunderstood.
 20 A. Right.
 21 Q. What did you say on that?
 22 A. I believe I said the issue was whether
 23 they had experienced financial distress costs and
 24 how much they had experienced in the way of
 25 financial distress costs.

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1 Robert W. Holthausen
 2 Q. You're distinguishing between whether
 3 Marvel experienced financial distress and whether
 4 they experienced costs as a result of the
 5 financial distress?
 6 A. Uh-huh.
 7 Q. I see.
 8 MR. ALLINGHAM: You have to say yes or
 9 no.
 10 A. Oh. Yes. Sorry.
 11 Q. Are you offering an opinion on whether
 12 Marvel experienced financial distress?
 13 A. No. I only offer an opinion on what the
 14 damages are associated with the holding company --
 15 issuance of the holding company notes.
 16 Q. Professor Holthausen, is there anything
 17 in your report, which is the only thing I have
 18 right now from you, which is incorrect?
 19 A. Not to my knowledge, other than the
 20 things that we just talked about is that it may be
 21 appropriate to do a present-value calculation on
 22 these costs.
 23 Q. And you've already told me some things
 24 that -- relating to things you've thought about
 25 since you've issued your report. Putting those to

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1 Robert W. Holthausen
 2 one side, because I've heard you on that, is there
 3 any opinions you would change or would be
 4 different if you're issuing your report today?
 5 A. No.
 6 Q. Okay. Would you please look at
 7 Exhibit 3 to your report?
 8 Okay. You see that's entitled "Documents
 9 Considered"?
 10 A. Yes.
 11 Q. And what do you mean by "considered" in
 12 this context?
 13 A. These are documents that I looked at in
 14 the course of coming up with my opinions in this
 15 matter.
 16 Q. Okay. So is any document that you
 17 looked at in the course of coming up with your
 18 opinions in this matter listed on Exhibit 3?
 19 MR. ALLINGHAM: Would you read that
 20 question back, please? I may have misunderstood.
 21 Q. I'll just say it. It's easier.
 22 Are any documents that you looked at in the
 23 course of coming to your opinions in this matter
 24 listed on Exhibit 3?
 25 A. Yes.

9 (Pages 30 to 33)

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1 Robert W. Holthausen
 2 Q. And did you look at any materials that
 3 are not listed on Exhibit 3?
 4 A. The only thing that I think that I have
 5 looked at -- it was subsequent to the report --
 6 that's not on this exhibit was, I looked at a
 7 letter from High River dated maybe December 17 or
 8 19 to the Andrews Group, and I looked at a
 9 March 5, '96, proposal -- I don't know if I have
 10 that date right -- a March 1996 proposal.
 11 Q. Proposal to who from whom?
 12 A. It was a proposal -- it was the Icahn --
 13 I'll call it the "Icahn proposal" to do the rights
 14 offering.
 15 Q. Would that have been a 1997 document?
 16 A. Ah, thank you. March '97, yes.
 17 Q. Okay. Anything else?
 18 A. And then I've also seen those analyst
 19 reports which we talked about a few minutes ago.
 20 Q. If you look at item 28H on Exhibit 3,
 21 you see it refers to a "comprehensive factiva,"
 22 f-a-c-t-i-v-a, search for the period January 1,
 23 1991 through December 31, 1997?
 24 A. Uh-huh.
 25 Q. What were the parameters of the search?

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1 Robert W. Holthausen
 2 A. Basically for articles involving Marvel,
 3 Marvel holding company notes. And it was not
 4 limited to certain sources. It was to any source
 5 at all.
 6 Q. Okay. And did you review all of the
 7 search output?
 8 A. Well, I reviewed a lot of it. As far as
 9 I know, I reviewed all of it, but -- I mean, I got
 10 a whole stack of factiva stuff, so as far as I
 11 know, I reviewed all of it.
 12 Q. The next item, 28I, refers to various
 13 Bloomberg articles for the same time period. Do
 14 you see that?
 15 A. Uh-huh.
 16 Q. Which articles did you look at?
 17 A. I don't remember off the top of my head.
 18 Q. Okay. Do you know how you selected
 19 them?
 20 A. Again, it was a search based on Marvel,
 21 Marvel Holdings, things of that nature.
 22 Q. And do you retain, I guess, the output
 23 of that search or those articles that you looked
 24 at?
 25 A. Those are retained by Charles River. I

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1 Robert W. Holthausen
 2 don't have them personally.
 3 Q. Did you review them?
 4 A. Yes.
 5 Q. And then you sent them back to Charles
 6 River? I'm just not clear how they get back to
 7 Charles River.
 8 A. Well, sometimes I work up in the offices
 9 in Charles River.
 10 Q. And is that what you did for this
 11 report?
 12 A. I was up there several times.
 13 Q. Okay. This would be a good time to ask
 14 you whether there was anyone besides yourself
 15 involved in the preparation of your rebuttal
 16 report.
 17 A. Could you define what you mean by
 18 "preparation"? Doing analysis?
 19 Q. Doing analysis, drafting, or any other
 20 work on the report.
 21 A. There were people from Charles River
 22 that I directed to do various work, which involved
 23 collecting data, doing various forms analysis that
 24 I directed. The people that I worked with
 25 primarily were Stephen O'Neil and Miguel Herce.

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1 Robert W. Holthausen
 2 There were other people who worked on that that I
 3 did not have direct contact with.
 4 MR. ALLINGHAM: Professor Holthausen,
 5 you have a habit -- and because it's your right
 6 hand and the court reporter is sitting to your
 7 right -- you put your hand up to your face. So it
 8 would help, I might suspect, if you kept your
 9 hands down.
 10 A. Okay.
 11 Q. What was the role of Mr. O'Neil?
 12 A. Mr. O'Neil is the primary person that I
 13 talked with during the engagement, and Miguel was
 14 the secondary person that I talked with. I forget
 15 Mr. O'Neil's title, to tell you the truth. He's
 16 more senior to Mr. Herce.
 17 Q. Did you do anything to -- I'm sorry.
 18 What work did -- what were the roles of the
 19 people that you worked with? Did you give them --
 20 what were the roles of the people you worked with?
 21 A. Well, I told them what kind of analysis
 22 I wanted done. I would tell them to search for
 23 articles. I would tell them to, you know, "We
 24 need stock prices from this time period. We need
 25 to run this probability distress model in this

10 (Pages 34 to 37)

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1 Robert W. Holthausen
 2 particular way." So I would give them assignments
 3 that they would have to do.
 4 Q. Okay. And did they perform economic
 5 analyses and calculations?
 6 A. That's what I think I just described to
 7 you.
 8 Q. Okay. Shows you what I know.
 9 And did you do anything to determine whether
 10 the work performed by these other people was
 11 accurate?
 12 A. Yeah. I check a lot of the work that's
 13 performed, so I go through and I go through a lot
 14 of the stuff that is done and check it for
 15 accuracy.
 16 Q. Do you check all the work that's done?
 17 A. Well, I check a lot of it. You know, I
 18 go back, and I look back to -- we pull numbers
 19 from 10Ks and things like that. I go back and I
 20 look at the 10Ks to see that the numbers are the
 21 numbers that I would have pulled out of the 10Ks
 22 and things like that.
 23 Q. And who drafted your rebuttal report?
 24 A. I drafted my rebuttal report.
 25 Q. Was there anyone else who was involved

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1 Robert W. Holthausen
 2 in the drafting?
 3 A. Nobody else drafted the report. I got
 4 comments on it, but I drafted it. It was on my
 5 computer the whole time except for maybe an hour.
 6 Q. What was the hour about?
 7 A. I asked them to put in a bunch of
 8 footnotes that I didn't want to type in.
 9 Q. How much time did you spend on your
 10 rebuttal report, any way you can quantify it?
 11 A. Oh, well, let's see. It must have
 12 been -- we're talking about all the analysis and
 13 everything?
 14 Q. Well, how much time you spent, I guess
 15 I'm asking you, as opposed --
 16 A. It must be somewhere between 80 and 90
 17 hours based upon what I said I billed.
 18 Q. Do you know what that is as a percentage
 19 of the total amount of time spent by everybody on
 20 the work?
 21 A. No idea.
 22 Q. And prior to finalizing your report, did
 23 you produce any drafts?
 24 A. Yes.
 25 Q. How many?

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1 Robert W. Holthausen
 2 A. I don't think I know the answer to that.
 3 Q. Was it more than one?
 4 A. Oh, sure. I mean, I was revising it
 5 continually. I mean, I would write it, and then
 6 I'd read it, and I'd make corrections to it and,
 7 you know, reword it and things like that, so I was
 8 constantly revising it, so -- you know.
 9 Q. How many iterations did you send out to
 10 other people for review and comment?
 11 A. I would say two or three.
 12 Q. Okay. And who did you send it to for
 13 review or comment?
 14 A. Stephen O'Neil at Charles River read it,
 15 and attorneys at Skadden read it.
 16 Q. And who did you receive comments from?
 17 A. I received comments from Stephen O'Neil
 18 and from the attorneys at Skadden.
 19 Q. Okay. And did you incorporate comments
 20 or suggestions from Mr. O'Neil into the final?
 21 A. They would give me some ideas about how
 22 to say something clearer, or they'd say that "This
 23 is isn't said very clearly. Can you rephrase it?"
 24 And so to the extent that I agreed with those
 25 kinds of comments, I would figure out how to

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1 Robert W. Holthausen
 2 redraft.
 3 Q. Did you receive any comments on
 4 substance as opposed to style?
 5 A. No.
 6 Q. Okay. What was your assignment as a
 7 rebuttal expert in this case?
 8 A. My assignment was to review the damages
 9 calculation of Mr. Baliban and comment on my
 10 opinion as to whether those were reasonable
 11 calculations or not.
 12 Q. Mr. Holthausen, would you please take a
 13 look at paragraph 2 of your report, which we've
 14 marked as Holthausen Exhibit 1?
 15 A. Uh-huh.
 16 Q. In your very first sentence of paragraph
 17 2, you note that Mr. Baliban's report discusses
 18 whether and to what extent Marvel Entertainment
 19 Group was harmed by the issuance of the -- and
 20 this is my own shorthand -- Marvel parent and
 21 Marvel III holding company notes?
 22 A. Right.
 23 Q. Okay. Now, your report addresses
 24 Mr. Baliban's opinions concerning the extent to
 25 which Marvel Entertainment was harmed by the

11 (Pages 38 to 41)

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1 Robert W. Holthausen
 2 issuance of Marvel parent and Marvel III notes.
 3 Isn't that true?
 4 A. That is correct.
 5 Q. Okay. My question is: Was it also part
 6 of your assignment to address the "whether"
 7 question, whether Marvel Entertainment was harmed
 8 by the issuance of the Marvel parent and
 9 Marvel III notes?
 10 A. Not in this -- not in this report.
 11 Q. Okay. Let me also understand if I can
 12 figure out what is or is not within the scope of
 13 your -- your work in your rebuttal report.
 14 Are you expressing an opinion on whether the
 15 note issuances by Marvel parent and Marvel III
 16 were a reason why Marvel financed acquisitions
 17 with bank debt rather than equity?
 18 A. Are we talking about -- can we clarify
 19 something? Are we talking about this report --
 20 Q. Yes.
 21 A. -- and only this report?
 22 Q. That is what I'm asking you.
 23 A. Okay. So can I infer for the rest of
 24 this deposition, unless you say otherwise, that
 25 when you ask me a question like that, it is just

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1 Robert W. Holthausen
 2 about this report?
 3 Q. That is very fair.
 4 A. Okay. I just wanted to clarify that.
 5 So now, would you ask the question again or repeat
 6 the question?
 7 Q. I'll try. Are you expressing an opinion
 8 in this report on whether the note issuances by
 9 Marvel parent and Marvel III were a reason why
 10 Marvel financed acquisitions with bank debt rather
 11 than equity?
 12 A. No, I'm not.
 13 Q. Okay. And in this report are you
 14 expressing an opinion on whether the
 15 debt-to-equity ratio in Marvel's capital structure
 16 was a cause of financial distress?
 17 A. No, I'm not.
 18 Q. And I think -- this may be implicit in
 19 what you told me earlier, but I just want to make
 20 sure I understand.
 21 Are you expressing an opinion in this report
 22 on whether Marvel became financially distressed
 23 after the issuance of the Marvel parent and
 24 Marvel III notes?
 25 A. No.

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1 Robert W. Holthausen
 2 Q. Your report addresses the extent to
 3 which there was injury, if any, flowing from that?
 4 A. Correct. Flowing from the issuance of
 5 the indenture holding notes.
 6 Q. Correct. Mr. Holthausen, on page 3 of
 7 your report, just above paragraph 6, do you see
 8 there's a caption entitled "Application of the
 9 Andrade" -- that's A-n-d-r-a-d-e -- "and Kaplan
 10 Study to Marvel"?
 11 A. Yes.
 12 Q. Okay. Could you just tell me which
 13 paragraphs of your report are addressing the
 14 application of the Andrade and Kaplan study to
 15 Marvel? Is that everything up through the next
 16 heading after paragraph 23?
 17 A. Well, there are -- yes, basically, but
 18 not every paragraph is going to talk about Andrade
 19 and Kaplan. And there are other calculations that
 20 are done, and then Andrade and Kaplan is again
 21 implied based upon those calculations, but
 22 basically that whole section 3 has to do with how
 23 I would think about applying Andrade and Kaplan to
 24 the Marvel situation.
 25 Q. Is it correct to say that paragraph 6

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1 Robert W. Holthausen
 2 through 14 of your report address the application
 3 of the Andrade and Kaplan study to Marvel?
 4 A. Are you excluding the paragraphs
 5 subsequent to 14?
 6 Q. No. I'm just saying at a minimum 6
 7 through 14. I don't mean to draw any negative
 8 inference on that. Just at least 6 through 14?
 9 Is that all about the application of the Andrade
 10 and Kaplan study to Marvel?
 11 MR. ALLINGHAM: Andrade.
 12 Q. Mr. Allingham informs me that it's
 13 mispronouncing Andrade. Since I don't know that
 14 that will show up on the transcript, I'll live
 15 with the consequences.
 16 A. Well, Andrade and Kaplan do not talk
 17 about theory of damages. And I get into that in
 18 those paragraphs. So certainly 6 to 14 has to do
 19 with Andrade and Kaplan, but it goes beyond
 20 Andrade and Kaplan.
 21 Q. Okay.
 22 A. I'm not really sure what your question
 23 is, so I'm trying to be responsive, but if that's
 24 not it, let me know.
 25 Q. Well, you are actually understanding

12 (Pages 42 to 45)

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1 Robert W. Holthausen
 2 what I'm asking you because I take it when you
 3 say, for example, in paragraph 7 what you believe
 4 is a conceptually correct measure, you are
 5 offering your own opinion as to how best to
 6 measure the impact of the indenture covenants as
 7 distinguished from saying something about how the
 8 Andrade and Kaplan study is being applied?
 9 A. Correct. Here I am talking about the
 10 right way to think about damages in this
 11 perspective with regard to the Marvel matter.
 12 Q. Okay. Let me just make sure I
 13 understand what -- at least what we're talking
 14 about in paragraph 7. When you say in paragraph
 15 7, "The conceptually correct measure to
 16 estimate" -- and then the sentence goes on from
 17 there, what is it that you're saying should be
 18 measured in the way you describe in paragraph 7?
 19 A. What I'm getting at here is the issue of
 20 an ex-ante, if you want, measure of damages versus
 21 an ex-post measure of damages. And so what I'm
 22 really arguing here is that when we think about:
 23 What are the potential costs associated with the
 24 indenture covenants -- and let me just say
 25 something to get it on the record, and I'll just

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1 Robert W. Holthausen
 2 say it once. Okay? I've been asked in this
 3 particular report to assume that Marvel was
 4 constrained by the holding company notes. Okay?
 5 So everything in this report makes that assumption
 6 that Marvel, in fact, was going to act in
 7 accordance with those holding company notes. I
 8 understand that that's a legal issue and that it's
 9 being asserted otherwise by the defendants, but
 10 I'm not making any opinion about that in this
 11 report. I've been asked to assume that they are
 12 constrained in that sense.
 13 Q. Okay. I'm actually asking you something
 14 really --
 15 A. Okay.
 16 Q. -- straightforward --
 17 A. Okay.
 18 Q. -- which is: What is it that you are
 19 saying should be estimated in the way you are
 20 describing? Is it the -- when you say "the
 21 conceptually correct measure to estimate," to
 22 estimate what? The injury --
 23 A. To estimate the injury, right. Or to
 24 estimate the injury associated with the issuance
 25 of the indenture covenants, you would want to

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1 Robert W. Holthausen
 2 measure what the expected value of those holding
 3 company -- the issuance of those holding company
 4 notes would have on Marvel.
 5 Q. And what is the basis for your opinion
 6 that the conceptually correct measure is "the
 7 incremental expected costs of financial distress
 8 associated with the indenture covenants at the
 9 time the notes were issued"?
 10 A. Okay. Well, I guess there's several
 11 parts to that. First, the way I think about it is
 12 the following. There is -- let's suppose
 13 there's -- the holding company notes are issued,
 14 and let's suppose that that, in some sense,
 15 affects Marvel's value. Okay? The impact of that
 16 is going to be based upon -- the impact on value
 17 is going to be based upon what the expected cost
 18 of those are to Marvel. And potentially let's
 19 assume -- let's take it, for sake of argument,
 20 that the holding company notes would, in fact,
 21 constrain Marvel in terms of their financing. If
 22 that were true and that increased the likelihood
 23 that Marvel would experience financial distress
 24 somewhere down the road, then the securities
 25 prices would respond to that news that, in fact,

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1 Robert W. Holthausen
 2 this could happen in the future. And so there
 3 would potentially be -- let's suppose there was.
 4 There could potentially be a decline in value.
 5 That decline in value is what you want to measure
 6 because it measures what the expected cost was
 7 associated with the holding company notes. If a
 8 stockholder -- once that information is made
 9 public and the price responds, if a stockholder
 10 wanted to not take the gamble that that financial
 11 distress cost would occur sometime in the future,
 12 then that stockholder could sell their stock at
 13 that point in time. So if the stock is liquidly
 14 traded and this event occurs which could have some
 15 impact on Marvel in the future, the expected cost
 16 of that would be recognized in the price now, and
 17 that is the damage suffered by those shareholders.
 18 If they choose to stay on after that, that's their
 19 choice as to whether they do that or not.
 20 Q. Is it your view that the indenture
 21 covenants could only have an impact on Marvel at
 22 the time that they are issued?
 23 A. No. The indenture impacts potentially
 24 could have an impact on Marvel at other times.
 25 Okay? Remember, I've been asked to assume that

13 (Pages 46 to 49)

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1 Robert W. Holthausen
 2 they can have an impact on Marvel. But the issue
 3 is in terms of a damage. How would you think
 4 about doing a damage calculation? The damage
 5 calculation should be based upon what the expected
 6 cost to the shareholder is at the time that this
 7 event takes place -- okay? -- because the
 8 shareholder can then, if they want to, decide that
 9 they no longer want to hold Marvel shares.
 10 Q. Since the indenture covenants could have
 11 an impact on Marvel at other times beyond the date
 12 when the notes are issued, why do you not think it
 13 proper to measure the impact on Marvel at those
 14 other times when it does have an impact?
 15 A. Because essentially what you would then
 16 be doing is, you would be -- you know, when
 17 shareholders make a decision to hold or not to
 18 hold a company stock, they're bearing some risk
 19 associated with holding a company stock. And that
 20 information was out and it was in the marketplace
 21 that these indentures were there, and so a
 22 shareholder who chooses to continue to hold on to
 23 those shares knows that that information is out
 24 there. The price at the time is going to reflect
 25 whatever impact that had at the time when those

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1 Robert W. Holthausen
 2 things were issued.
 3 THE VIDEOGRAPHER: One second.
 4 MR. GOLDWATER: Are you changing tapes?
 5 THE VIDEOGRAPHER: Just one second.
 6 Okay.
 7 Q. Professor Holthausen, are you trying to
 8 measure the impact of the indenture covenants on
 9 the shareholders of Marvel as distinguished from
 10 Marvel as an enterprise?
 11 A. No. I measure it on Marvel as an
 12 enterprise. I was using shareholders as an
 13 example of that, but it is measured on Marvel as
 14 an enterprise.
 15 Q. Did the indenture covenants have an
 16 impact on Marvel on the date that the holding
 17 company notes were issued?
 18 A. Was there a price response?
 19 Q. Was there an injury to Marvel on the
 20 date that the Marvel parent and Marvel III holding
 21 company notes were issued?
 22 A. There was no -- to my knowledge, there
 23 was no statistically significant price stock
 24 effect on those dates.
 25 Q. I don't know if we're saying the same

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1 Robert W. Holthausen
 2 thing. I was asking you: Is there was an injury
 3 to Marvel on the date that the parent and
 4 Marvel III notes were issued? Are we saying the
 5 same thing, that there is no injury on that date?
 6 A. I mean, there are price movements on
 7 various days, and then there are issues of whether
 8 or not those price movements are statistically
 9 significant or not.
 10 Q. Okay. I'm not talking about price
 11 movements at all.
 12 A. Okay.
 13 Q. I'm just asking you a question, which
 14 is: On the date that the Marvel parent and
 15 Marvel III notes were issued, did the issuance of
 16 those notes cause -- injure Marvel, have an impact
 17 on Marvel?
 18 A. I assess several different -- I have
 19 several different damage estimates. Okay? And
 20 depending upon relying on the Andrade Kaplan --
 21 and Kaplan study, just as Baliban did. However, I
 22 looked at the Andrade and Kaplan study and looked
 23 at a lot of the evidence in Andrade and Kaplan.
 24 And based upon that, my analysis suggests you get
 25 damages anywhere between zero and \$12 million.

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1 Robert W. Holthausen
 2 Q. Okay. I can read Andrade and Kaplan,
 3 too. My question is to you as an expert: Is it
 4 your opinion that on the date that the Marvel
 5 parent and Marvel III notes are issued, Marvel
 6 sustains an injury?
 7 A. Again, conditioned on what my assignment
 8 was here -- my assignment here was to assume that
 9 Marvel was going to be constrained by the holding
 10 company notes. Based upon that, I estimate
 11 damages that go between zero and \$12 million at
 12 the time of the issuance of the holding company
 13 notes. And, you know, where in that range it
 14 is -- you know, there are arguments it could be
 15 zero, there are arguments it could be \$12 million,
 16 depending upon which of the numbers you want to
 17 pull from the Andrade and Kaplan study.
 18 Q. So all you can say as to whether there's
 19 injury on the day they're issued is, there may be
 20 there may not be?
 21 A. Well, I'm giving a range of estimates of
 22 between zero and \$12 million on the date of the
 23 issuance.
 24 Q. If it's zero, then there's no injury?
 25 A. If it's zero, there's no injury.

14 (Pages 50 to 53)

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1 Robert W. Holthausen
 2 Q. If it's \$12 million, it's \$12 million of
 3 injury?
 4 A. Correct.
 5 Q. Okay. And in November of 1996 when
 6 Marvel is in a liquidity crisis, do the indenture
 7 impact -- I'm sorry -- do the indenture covenants
 8 have an impact on Marvel's ability to obtain
 9 financing?
 10 A. Are you asking me about my opinions in
 11 this report?
 12 Q. Well, if -- certainly if you don't have
 13 an opinion on that question, then, by all means,
 14 you should tell me you don't have an opinion. But
 15 I don't know whether you do or you don't, so all I
 16 can do is ask you this question.
 17 In November of 1996 did the indenture
 18 covenants have an impact on Marvel when it was in
 19 the throws of its liquidity crisis?
 20 A. In -- now we're going to have to go back
 21 to my first report, not this report, because I
 22 wasn't asked to discuss that issue in this
 23 particular report. Right? In the first report,
 24 what I do is, I go through and I talk a lot about
 25 sections 404, 405, 409. I talk about all those

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1 Robert W. Holthausen
 2 sections, and I talk about the different things
 3 that Marvel could have done, not just in November,
 4 but they could have done throughout the time
 5 period that the holding company notes were issued.
 6 So there are -- there were lots of alternatives
 7 that Marvel had under section 404, 405, and 409
 8 that would have allowed them to issue debt, issue
 9 preferred stock, issue common equity, things of
 10 that nature. So those were things that were
 11 discussed in my first report and my second report.
 12 Q. Okay. There's no hypotheticals at all
 13 built into my question. I'm not asking you for
 14 any hypothetical "what if" scenarios. I'm just
 15 asking you a question based on your observation of
 16 historical fact.
 17 My question is: In November of 1996, did the
 18 indenture covenants have an impact on Marvel?
 19 MR. ALLINGHAM: That question is the
 20 same question you just asked that you got an
 21 answer to.
 22 MR. GOLDWATER: Yes, it is.
 23 MR. ALLINGHAM: I object. Asked and
 24 answered.
 25 MR. GOLDWATER: Well, certainly asked.

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1 Robert W. Holthausen
 2 I agree with you on that.
 3 Q. There's no hypotheticals here. I'm not
 4 asking what Marvel could have done differently to
 5 avoid the situation that, in fact, it was in. I'm
 6 just asking you as a matter of historical fact:
 7 Did Marvel sustain injury from the indenture
 8 covenants in November of 1996?
 9 MR. ALLINGHAM: Well, that's a different
 10 question than the one you asked earlier.
 11 MR. GOLDWATER: Well, all right. That's
 12 the one that's on the table.
 13 MR. ALLINGHAM: Okay.
 14 A. Okay. So say the question again.
 15 MR. GOLDWATER: Please read
 16 Mr. Holthausen the question.
 17 (Counsel requests the reading of the
 18 following testimony:
 19 "QUESTION: There's no hypotheticals
 20 here. I'm not asking what Marvel could have done
 21 differently to avoid the situation that, in fact,
 22 it was in. I'm just asking you as a matter of
 23 historical fact: Did Marvel sustain injury from
 24 the indenture covenants in November of 1996?")
 25 A. I mean, there were things that Marvel

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1 Robert W. Holthausen
 2 still could have done in November of '96 had it
 3 wanted to. I mean, it could have issued equity
 4 had it wanted to. Whether or not there would have
 5 been an appetite in the marketplace for an equity
 6 issuance is -- you know, that's a different
 7 question having to do with what people thought
 8 about Marvel and whether they wanted to invest in
 9 Marvel at the time. But had Marvel wanted to,
 10 Marvel could have issued equity, assuming that
 11 there was an appetite in the marketplace. And I
 12 don't think the holding company notes would have
 13 affected its ability to issue equity.
 14 Q. So your answer to whether Marvel
 15 sustained an injury from the indenture covenants
 16 in November of 1996 is what? Yes, no, or you're
 17 not sure, you don't know?
 18 A. Well, I think that they had alternatives
 19 that were available to them that -- you know,
 20 there were no -- there were things that they could
 21 have done even with the indenture notes there.
 22 Let me rephrase that. There were actions that
 23 Marvel could have taken that were not constrained
 24 by the existence of the indenture holding notes --
 25 by the holding company notes. And whether or not

15 (Pages 54 to 57)

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1 Robert W. Holthausen
 2 there was an appetite in the marketplace for them
 3 to issue equity, for example, that's a different
 4 question than saying that -- did the holding
 5 company notes themselves harm them, harm Marvel?
 6 Q. So does that lead you to believe that
 7 Marvel did not sustain injury from the indenture
 8 covenants in November of 1996?
 9 A. It leads me to believe they had options
 10 open to them potentially that the holding company
 11 notes didn't constrain them from taking. Now,
 12 that doesn't mean that they were able to issue the
 13 equity or that they did issue equity or whatever.
 14 Q. Okay. I clearly understand that you're
 15 telling me that you think, in your opinion, Marvel
 16 had options open to them. What I'm not
 17 understanding is whether you have a view and, if
 18 you do, what is your view as to whether Marvel was
 19 injured by the indenture covenants of November of
 20 1996.
 21 A. I do not -- again, I believe they had
 22 options open to them and that they -- that there
 23 were actions that Marvel could have taken --
 24 okay? -- that would -- whether or not -- again,
 25 whether there was an appetite out there or not,

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1 Robert W. Holthausen
 2 that would have allowed them to do those things
 3 even with the existence of the holding company
 4 notes.
 5 Q. Are you just unable to answer my
 6 question?
 7 A. I don't know. I think I am.
 8 MR. ALLINGHAM: Objection to the form of
 9 the question.
 10 A. I think I am answering it.
 11 Q. Okay. And I have certainly heard you
 12 say that you believe Marvel had options open to
 13 them. Does that mean -- and where does that lead
 14 you in your thinking? Does that lead to you
 15 believe that Marvel did or did not sustain injury
 16 as a result of the indenture covenants in November
 17 of 1996, or does it not lead you anywhere? I have
 18 no idea, but I really would like to know your view
 19 on this.
 20 A. Well, the -- my view of this is that the
 21 market knew about the holding company notes prior
 22 to November of 1996 and that there was information
 23 out there in the marketplace about the existence
 24 of those holding company notes and what impact
 25 they might have on Marvel. And that was all known

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1 Robert W. Holthausen
 2 prior to November of 1996. So I don't believe
 3 that, for example, the price decline that is
 4 observed on November 12, 1996, has to do with the
 5 holding company notes. That price response is
 6 not, in my opinion, a price response because of
 7 the holding company notes.
 8 Q. Professor Holthausen, did the indenture
 9 covenant limit Marvel's financing options in
 10 November of 1996?
 11 MR. ALLINGHAM: This is, again, based on
 12 the assumption that you were asked to make?
 13 MR. GOLDWATER: It's just a question.
 14 It's not edited in any way, and he can answer any
 15 way he wants.
 16 A. Well, again, under the assumption that
 17 Marvel was constrained by these holding company
 18 notes. Right? I mean, that's what the basis of
 19 my report was written on.
 20 Q. Yes, that's what I understood all your
 21 things that you said in your report to be premised
 22 on.
 23 A. Right.
 24 Q. Okay. So on that premise, did the
 25 indenture covenants limit Marvel's financing

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1 Robert W. Holthausen
 2 flexibility in November of 1996?
 3 A. I still think they -- as I said, I think
 4 they had options and they had flexibility at that
 5 point in time if there was an appetite in the
 6 marketplace.
 7 Q. Okay.
 8 A. I don't understand what I'm not
 9 answering.
 10 Q. Whether -- I'm not asking you, although
 11 you keep telling me that, whether Marvel had
 12 financing options open to them in November of
 13 1996. What I'm asking you is whether the
 14 indenture covenants were -- imposed any limitation
 15 on Marvel's ability to obtain financing in
 16 November of 1996. Assume a world in which there
 17 are no indenture covenants and Marvel has a
 18 universe of financing options. Next, assume a
 19 universe that actually existed, which is the
 20 universe where there are indenture covenants. And
 21 please tell me, as compared between those two
 22 universes: Are Marvel's financing options limited
 23 in the universe where there are indenture
 24 covenants?
 25 A. I don't think they had any impact on

16 (Pages 58 to 61)

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1 Robert W. Holthausen
 2 Marvel's ability to go out and get financing
 3 between those two worlds.
 4 Q. Okay. So your opinion is that Marvel
 5 sustained no injury from the indenture covenants
 6 in November of 1996?
 7 A. No. I'm saying that -- I'm saying that
 8 they had the ability to go out and obtain
 9 financing and -- during that time period, and they
 10 still had those options open to them even though
 11 the indenture covenants were in existence.
 12 Q. And did they have all the options that
 13 they would have had, had there been no indenture
 14 covenants?
 15 A. Well, there were limitations, for
 16 example, on, you know -- if Perelman was going to
 17 act in accordance with the indenture covenants,
 18 there were limitations on the fact that Perelman
 19 had owned a majority of the shares.
 20 Q. So --
 21 A. But that still would have left many
 22 options open.
 23 Q. So to some extent, there were -- they
 24 had less options than they would have had without
 25 the indenture covenants. Isn't that right?

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1 Robert W. Holthausen
 2 A. There may have been less options, but
 3 they still had plenty of options available to
 4 them.
 5 Q. Okay. But I think we're saying the same
 6 thing, then, which is --
 7 MR. ALLINGHAM: Andrew, you've been at
 8 this for 20 minutes. Don't you think that the
 9 record is pretty clear?
 10 MR. GOLDWATER: No. I think I'm not
 11 getting answers to my questions. That's what I
 12 think.
 13 MR. ALLINGHAM: Well, you're entitled to
 14 keep asking as long as you like. I thought that
 15 the record was pretty clear.
 16 MR. GOLDWATER: Okay. Great.
 17 Q. I think we're now saying the same thing,
 18 or hopefully we're saying the same thing. We
 19 agree now that Marvel did not have all of the
 20 financing flexibility or options that it would
 21 have had, had the indenture covenants not been in
 22 existence. Isn't that what we're both saying now?
 23 A. Well --
 24 MR. ALLINGHAM: I object. I'm sorry to
 25 object to the form of the question, but that's not

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1 Robert W. Holthausen
 2 a proper question.
 3 Q. Am I misunderstanding?
 4 A. What I'm saying is that there was plenty
 5 of flexibility still there. They could have
 6 issued -- they could have issued equity, and they
 7 still would have owned a majority of the shares.
 8 Q. Okay. Let me ask you -- since you keep
 9 saying it, let me just ask you about it.
 10 You're saying Marvel could have issued equity
 11 in November of 1996?
 12 A. I said -- but, again, I said: Whether
 13 there was any appetite in the marketplace for
 14 that, I don't know the answer to that. You know,
 15 forget the indenture company notes. Right? Just
 16 Marvel alone in its -- as it was in November of
 17 1996, could they have issued equity? Would there
 18 have been an appetite for issuance of equity,
 19 absent the holding company notes? I haven't done
 20 an analysis of that.
 21 Q. Okay. My question actually is not a
 22 hypothetical question. It doesn't assume away the
 23 indenture covenants. It's a question based on the
 24 facts as they were in November of 1996.
 25 In November of 1996, is it your view that

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1 Robert W. Holthausen
 2 Marvel could have issued equity?
 3 A. With the holding company notes?
 4 Q. Correct.
 5 A. I've not done an analysis of whether
 6 they could have issued equity at that point in
 7 time.
 8 Q. Okay. And so what were the other
 9 financing options that you believe were open to
 10 Marvel in November of 1996? You think they could
 11 have issued more debt at that time?
 12 A. No, no. I've already said that I don't
 13 think they could have issued any more debt in
 14 November of 1996.
 15 Q. So I guess that raises the question:
 16 What financing options were open to them in
 17 November of 1996?
 18 A. Well, I mean, primarily it would have
 19 been for an equity infusion.
 20 Q. Okay. And unless my short-term memory
 21 is going, I thought you had told me that you
 22 hadn't looked at whether Marvel could have issued
 23 equity in November of 1996.
 24 A. I didn't do an analysis of whether there
 25 would be an appetite for an equity issuance of

17 (Pages 62 to 65)

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1 Robert W. Holthausen
 2 Marvel in November of 1996.
 3 Q. Okay. And have you looked at or do you
 4 have a view on how much equity Marvel could have
 5 raised in November of 1996?
 6 A. No, I haven't looked at that.
 7 Q. Okay. Do you remember reading in the
 8 material that you considered that Mr. Perelman was
 9 suggesting that Marvel needed \$350 million in an
 10 equity infusion in order to carry on as a viable
 11 business?
 12 A. Correct.
 13 Q. Okay. Do you know whether Marvel could
 14 have raised \$350 million in any sort of financing
 15 in November of 1996?
 16 A. Well, I mean, there was the Perelman
 17 off -- the Andrews Group proposal for
 18 \$350 million, and then there was a proposal from
 19 Icahn where Icahn said that they would -- I think
 20 he originally that they would put in \$350 million,
 21 and then I think subsequently he said that they
 22 would put in \$365 million.
 23 Q. Okay. The --
 24 A. Those would both be equity infusions.
 25 Q. The Perelman offer was conditioned on a

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1 Robert W. Holthausen
 2 financial distress associated with the indenture
 3 covenants at the time the notes were issued," what
 4 is the benchmark you're using for determining what
 5 is correct?
 6 A. I'm just using economic theory here in
 7 terms of how you would think about the damage, if
 8 you want, sustained by the claim holders if, in
 9 fact, the indenture covenants increased the
 10 likelihood that Marvel would experience financial
 11 distress. So the issue is -- you know, there is
 12 some possibility, absent any indenture company
 13 notes, that Marvel would experience financial
 14 distress, so that can occur even without the --
 15 without the holding company notes. And so then
 16 the issue would be: Well, if you have holding
 17 company notes, does that change the probability of
 18 financial distress? And so, you want to estimate
 19 sort of the incremental expected cost of those
 20 financial distress, which is basically the harm
 21 that would have been suffered at the time that
 22 those notes were issued.
 23 Q. Okay.
 24 A. The way to think about that is -- I
 25 think actually in the Third Circuit Court of

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1 Robert W. Holthausen
 2 waiver of the indenture covenants, was it not?
 3 A. Correct.
 4 Q. Okay. And was the Icahn offer also
 5 conditioned on a waiver of the indenture
 6 covenants?
 7 A. I don't remember the answer to that.
 8 Q. Okay. And I guess my question is --
 9 A. Because Icahn represented the
 10 noteholders, as far as I know, in that
 11 transaction. It was going to be a rights offer.
 12 Anyway ...
 13 Q. Yeah. I guess my question is, you know:
 14 Putting aside offers which require the indenture
 15 covenants to go away, do you have a view on
 16 whether Marvel could have raised \$350 million in
 17 November of 1996?
 18 A. Just in a public offering?
 19 Q. Any way, public, private, any way.
 20 A. Again, I have not done analysis if they
 21 could have gone out and done a public offering for
 22 \$350 million.
 23 Q. Thank you. When you say in paragraph 7
 24 of your report that "The conceptually correct
 25 measure is the incremental expected cost of

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1 Robert W. Holthausen
 2 Appeals opinion, there was actually a statement in
 3 there that said, you know, another way -- a way to
 4 think about what might have happened here would
 5 have been -- if there had been an arm's-length
 6 transaction between Andrews and Marvel, you know,
 7 what would be, you know, for the issuance of the
 8 holding company notes, what kind of compensation
 9 might Marvel have demanded in an arm's-length
 10 transaction? One way to think about that is:
 11 Okay. Well, what are the expected costs
 12 associated with issuing those holding company
 13 notes?
 14 Q. Okay. When I asked you about what was
 15 your benchmark, you mentioned up front that it was
 16 economic theory. What is the economic theory that
 17 you are alluding to?
 18 A. Well, I think it's just a damages
 19 theory. Right? So you have -- some event takes
 20 place. Okay? There is an effect on value
 21 associated with that act. The claim holders are
 22 free to exit as soon as that has taken place
 23 unless, for some reason, their claim isn't
 24 marketable or they can't exit. If they can exit
 25 at that point in time, the damage they're going to

18 (Pages 66 to 69)

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1 Robert W. Holthausen
 2 suffer is from, you know. What was the value
 3 before the act? What was the value after the act?
 4 And then if they choose to exit or not exit,
 5 that's their business, but they had the right to
 6 exit immediately after that.
 7 Q. When you're talking about the claim
 8 holders, you're talking about Marvel stockholders?
 9 A. It could have been stockholders. It
 10 could have been debt holders. It could have been
 11 vendors. Right? I mean, they all have a choice
 12 of continually making decisions as to whether or
 13 not they want to be a claim holder in Marvel.
 14 Q. And what is it that would alert them --
 15 what's the event that's supposedly alerting them
 16 to -- that there's going to be an effect on value?
 17 A. Well, it's in the public record that
 18 these holding company notes have been issued, and
 19 it's discussed in -- not only in the prospectuses
 20 for the holding company notes, but in lots of
 21 Marvel documents as well.
 22 Q. And is it your view that if the claim
 23 holders don't react immediately upon the issuance
 24 of the holding company notes, that all the events
 25 that happened past that date are not -- any

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1 Robert W. Holthausen
 2 effects on the value of Marvel are not effects for
 3 which Marvel is entitled to recompense?
 4 A. Right. I think that they had the option
 5 of whether or not -- you know, I'm not saying the
 6 day. Okay? You know, you may not be able to exit
 7 in a day. Right? But over some reasonable amount
 8 of time, if you didn't like the way that -- what
 9 might happen at Marvel, you would have the ability
 10 to exit from that. And so what I'm trying to do
 11 here is, I'm trying to estimate this expected
 12 value or this ex-ante cost of these indenture
 13 company notes.
 14 Q. Have you ever estimated damages in a
 15 tort case before?
 16 A. Not in a tort case.
 17 Q. Is it your view that the damage in a
 18 tort case must be coincident with the breach of
 19 duty?
 20 A. You're using terms that sound like legal
 21 terms to me that I don't understand.
 22 Q. I am, and I apologize.
 23 A. Okay. I don't understand what you're
 24 asking me.
 25 Q. I'll try to do better.

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1 Robert W. Holthausen
 2 Am I understanding you correctly,
 3 Professor Holthausen, that, in your view, if
 4 Marvel sustains injury beyond some reasonable
 5 period after the issuance of the holding company
 6 notes, that is not injury for which Marvel claim
 7 holders are entitled to recover damages?
 8 A. I think we have to be a little more
 9 careful in our wording, so let me try to rephrase
 10 your question, or maybe you want to rephrase it.
 11 I don't care. Could you read that back, and then
 12 I'll try to rephrase it?
 13 (Counsel requests the reading of the
 14 following testimony:
 15 "QUESTION: Am I understanding you
 16 correctly, Professor Holthausen, that, in your
 17 view, if Marvel sustains injury beyond some
 18 reasonable period after the issuance of the
 19 holding company notes, that is not injury for
 20 which Marvel claim holders are entitled to recover
 21 damages?")
 22 A. Okay. And the thing is that the only
 23 thing that -- the thing that happened was that I
 24 want to get on -- I guess get clarified is, in
 25 your question, what you're assuming is that the

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1 Robert W. Holthausen
 2 holding company notes were issued, and that was
 3 the -- that was the only thing that happened. And
 4 then everything else that happened was a result of
 5 the issuance of those holding company notes. Is
 6 that your question?
 7 Q. Yes, that is my question.
 8 A. Yeah. Okay. But I just wanted --
 9 because you said some -- you know, certain
 10 things -- you didn't say that other events didn't
 11 transpire. Right?
 12 Q. It's almost my question. Not everything
 13 else that happened as a result of the indenture
 14 covenants, but that if the indenture -- and I'll
 15 try to help -- I'll try to rephrase.
 16 MR. ALLINGHAM: Good, because I think if
 17 we're going to do it serially, it's not going to
 18 work.
 19 MR. GOLDWATER: Of course we are.
 20 Q. If the indenture covenants are issued on
 21 day one, and three years after day one Marvel
 22 sustains economic injury from the existence of the
 23 holding company notes, is it your view -- do you
 24 have a view on whether Marvel is entitled to
 25 recover damages for the injury it sustains in year

19 (Pages 70 to 73)

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1 Robert W. Holthausen
 2 three, even assuming a breach of duty three years
 3 earlier?
 4 A. The claim holders of Marvel?
 5 Q. Correct.
 6 A. Okay. First of all, I'm not a lawyer.
 7 Right? So the law may have something to say about
 8 what is the right --
 9 THE REPORTER: One at a time.
 10 Q. Yes, as an economic matter, absolutely.
 11 A. -- what is the right way and what is the
 12 wrong way to do it from a matter of law. I'm not
 13 a lawyer. That's up to you guys and a judge to
 14 figure out whether there's some case law here that
 15 speaks to that issue. But with regard to the
 16 issue of the holding company notes, yeah, my view
 17 is that when the holding company notes are issued,
 18 if there's some harm associated with the issuance
 19 of those, the claim holder should be compensated
 20 based upon what that harm was at the time because
 21 they are --
 22 Q. At what time? I'm sorry to interrupt.
 23 A. At the time the holding company notes
 24 are issued. Okay? Because they're free to exit
 25 from holding Marvel securities subsequent to that.

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1 Robert W. Holthausen
 2 Q. And what information is available to the
 3 claim holders at the time the notes are issued?
 4 A. Well, they know about -- they know that
 5 the holding company notes have been issued. They
 6 know that -- I mean, all this stuff is a matter of
 7 public record. They would know what the indenture
 8 covenants are. There are analyst reports about
 9 the holding company notes. There are Marvel
 10 documents per se, not the holding company
 11 documents, but the Marvel documents per se about
 12 the holding company notes, so there's a lot of
 13 stuff that gets into the public record. So once
 14 that information is in the public domain or in the
 15 public record, then people could choose to remain
 16 there or not in terms of continuing to hold Marvel
 17 securities or not.
 18 Q. Okay. But Marvel is not a claim holder,
 19 is it? It's just an entity?
 20 A. It's just an entity.
 21 Q. It's there the whole time whether -- it
 22 doesn't have choices here. It's just there.
 23 A. But the claim holders have choices.
 24 Q. I agree with you. Claim holders may or
 25 may not have choices, depending on what

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1 Robert W. Holthausen
 2 information is available to them. I take it
 3 Marvel doesn't have any choices akin to the
 4 choices that are available to claim holders.
 5 Isn't that right?
 6 A. I'm under the impression that it's the
 7 claim holders that are here in this matter.
 8 Q. Okay. And if it turned out that, in
 9 fact, the plaintiffs in this case stand in the
 10 shoes of Marvel, would that affect your analysis
 11 of the damages in this case?
 12 A. I don't know what that means, "stands in
 13 the shoes of Marvel." It sounds like a legal term
 14 to me.
 15 Q. All it means is that we are Marvel for
 16 purposes of this lawsuit. We're not shareholders
 17 of Marvel. We're not creditors of Marvel. We're
 18 the corporate entity.
 19 A. Well, Marvel is just made up of claim
 20 holders.
 21 Q. So you -- you -- can you conceive of a
 22 damages analysis where Marvel as an entity is
 23 trying to recover damages as distinguished from
 24 the claim holders of Marvel? Is that something
 25 you've thought about?

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1 Robert W. Holthausen
 2 A. No.
 3 Q. Okay. And that's not something you did
 4 when -- that you thought about when you were
 5 putting your damages report together in this case?
 6 A. No. I'm thinking about it from the
 7 claim holder's perspective.
 8 MR. GOLDWATER: Okay. Do you guys want
 9 to take a break, take a short break?
 10 THE VIDEOGRAPHER: Standby. The time
 11 now is 11:35 a.m., and we're going off the record.
 12 (There is a recess taken.)
 13 THE VIDEOGRAPHER: The time now is 11:42
 14 a.m., and we're back on the record.
 15 BY MR. GOLDWATER:
 16 Q. Professor Holthausen, I think I now
 17 understand how you went about doing your analysis,
 18 so let me ask you these questions.
 19 Am I correct that in forming your opinion you
 20 did not consider whether the indenture covenants
 21 had an impact on Marvel in 1995 and 1996?
 22 A. I did an analysis of what the impact was
 23 in the October announcement of 1996, October 17,
 24 to see what the impact was at that point in time
 25 when there was information about the Perelman --

20 (Pages 74 to 77)

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1 Robert W. Holthausen
 2 the Andrews Group offer, so I did an analysis
 3 then. I did not -- and I did an analysis of what
 4 Mr. Baliban did in November of 1996 to examine
 5 whether I believed that his damage calculation was
 6 appropriate or not.
 7 Q. Okay. And you did. I apologize for
 8 overlooking that. Am I correct that aside from
 9 the analysis you did of the impact of
 10 announcements in October and November of 1996 when
 11 you were looking at the question of financial
 12 distress costs in general without reference to
 13 those specific announcements, you did not look at
 14 the impact of the indenture covenants on Marvel in
 15 1995 and 1996?
 16 A. Absent the announcement effects?
 17 Q. Correct.
 18 A. Well, I mean, in my first report I
 19 talked a lot about -- my first and second
 20 report -- excuse me -- I talked -- again, I don't
 21 know if we're talking about the third report or
 22 the first and the second report. If we're talking
 23 about the first and second report, there was a lot
 24 of analysis in there about what Marvel could have
 25 done through 1995 and 1996.

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1 Robert W. Holthausen
 2 Q. Okay.
 3 A. In this third report, the only specific
 4 things about Marvel in, say, October and November
 5 of 1996 have to do with the announcement effects.
 6 Q. Okay. And I am talking about this third
 7 report now.
 8 A. Okay.
 9 Q. So aside from the announcement effects,
 10 you did not look at the impact of the indenture
 11 covenants in 1995 and 1996?
 12 A. In this report?
 13 Q. In this report.
 14 A. Correct.
 15 Q. Okay. And in paragraph 7 of this
 16 report, this Holthausen Exhibit 1 where you're
 17 talking about "the conceptually correct measure,"
 18 is it your -- do you mean that what you describe
 19 in paragraph 7 is the only correct measure of
 20 actual damages caused by indenture covenants, or
 21 does it mean that it's comparatively more correct
 22 than the measure in Mr. Baliban's report?
 23 A. I think it's the correct -- I think it's
 24 the correct measure. It's the measure at the time
 25 of the indenture covenant agreements, and so that

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1 Robert W. Holthausen
 2 is how I would determine damages in this
 3 particular case.
 4 Q. Okay. Is it the one and only correct
 5 measure of damages, in your view?
 6 A. Yes.
 7 Q. Okay. Assuming the Andrade and Kaplan
 8 study is correctly applied, is that study a
 9 reasonable way to determine the damages caused by
 10 financial distress?
 11 A. Well, the Andrade and Kaplan study -- I
 12 guess I'm not going to be able to answer your
 13 question because there's so much entailed in the
 14 statement "correctly applied." So I believe I've
 15 correctly applied Andrade and Kaplan. I don't
 16 believe that Mr. Baliban did. So there's so many
 17 steps in the words "correctly applied" that you
 18 used, I don't know how to answer that question.
 19 Q. Yeah. I'm not asking a question that
 20 has any relation to anything you did or
 21 Mr. Baliban did. I'm just asking you an abstract
 22 question, which is: Assuming it's correct
 23 application by an economist, is the study a
 24 reasonable methodology to determine damages caused
 25 by financial distress?

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1 Robert W. Holthausen
 2 A. It's a reasonable methodology, assuming
 3 that you use all of the evidence in there to try
 4 to learn something about financial distress costs.
 5 It is not an article about how to compute damages
 6 in a particular situation.
 7 (Mr. Fasman enters the room.)
 8 Q. In forming your opinions,
 9 Professor Holthausen, did you consider whether or
 10 not Marvel, in fact, suffered financial distress
 11 after the issuance of the Marvel parent and
 12 Marvel III notes?
 13 A. No. I just estimated -- I used the
 14 Andrade and Kaplan study to estimate what those
 15 financial distress costs would have been, given
 16 the Andrade and Kaplan study.
 17 Q. Okay. And did you consider in forming
 18 your opinions whether the impact of financial
 19 distress on Marvel is something that would be
 20 sustained over a period of time extending beyond
 21 the issuance of the Marvel parent and Marvel III
 22 notes?
 23 A. Well, the Andrade and Kaplan -- well, my
 24 damage analysis is based upon the expected costs
 25 of those financial distress at the time the

21 (Pages 78 to 81)

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1 Robert W. Holthausen
 2 indenture company notes are issued, which takes
 3 into consideration that the financial distress
 4 costs may occur at some point in the future.
 5 Q. So you took it into account to the
 6 extent that you are predicting probabilities of
 7 financial distress in the future?
 8 A. Right, and then what those future
 9 financial distress costs would be, and then
 10 calculating their expected value.
 11 Q. Okay. The present valuing is something
 12 that's not in your report, but that you're
 13 thinking about?
 14 A. Correct. But I didn't talk about that
 15 just then. I talked just about the expected
 16 value, yes.
 17 Q. Do you believe that your focus on a
 18 single point in time, predicting probabilities
 19 from a single point in time is consistent with the
 20 Andrade and Kaplan studies' methodologies for
 21 measuring the impact of financial distress?
 22 MR. ALLINGHAM: I'm sorry, Andrew, but
 23 would you read that back?
 24 MR. GOLDWATER: Sure.
 25 MR. ALLINGHAM: Or can you read it

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1 Robert W. Holthausen
 2 Q. So does that mean that it's not relevant
 3 to your methodology whether or not they actually
 4 did sustain financial distress?
 5 A. That's correct.
 6 Q. And in an analysis of actual damages in
 7 a tort case, why is it not relevant to look at
 8 whether the plaintiff actually sustained financial
 9 harm?
 10 MR. ALLINGHAM: Objection. Calls for a
 11 legal conclusion.
 12 A. I think you're asking me a legal
 13 question.
 14 Q. I'll -- fair enough. Let me try to
 15 restate it.
 16 In a damages analysis, do you think that it's
 17 inappropriate to look at whether -- to look at
 18 whether the plaintiff actually sustained harm?
 19 A. I don't think you've given me nearly
 20 enough facts to answer that question.
 21 Q. Do you think it's inappropriate to look
 22 at whether Marvel Entertainment actually sustained
 23 injury from financial distress in 1995 or 1996?
 24 A. I think the issue here is: What are the
 25 expected costs of financial distress at the time

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1 Robert W. Holthausen
 2 again?
 3 MR. GOLDWATER: I can just say it.
 4 Q. Do you believe that your focus on a
 5 single point in time is consistent with Andrade
 6 and Kaplan's methodologies for estimating the
 7 impact of financial distress?
 8 MR. ALLINGHAM: I object to the form of
 9 the question.
 10 A. I'm trying to do something here that's
 11 different than what Andrade and Kaplan are doing.
 12 I'm trying to measure the ex-ante costs of
 13 financial distress. Their measure is primarily an
 14 ex-post measure. They talk about the expected
 15 costs of financial distress in that study, but
 16 they're primarily measuring the ex-post cost of
 17 financial distress because they only look at
 18 companies that experience financial distress.
 19 Q. Is it relevant to your opinions,
 20 Professor Holthausen, that Marvel actually did
 21 suffer financial distress?
 22 A. My opinion is based upon the expected
 23 value of financial distress, which is -- has to do
 24 with the probability that they will suffer
 25 financial distress.

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1 Robert W. Holthausen
 2 those indenture company notes are issued? for the
 3 reasons that I've articulated before.
 4 Q. Those are the reasons based on the
 5 choices available to claim holders of Marvel?
 6 A. Yes, right.
 7 Q. And -- okay. And if Marvel itself as an
 8 enterprise is the plaintiff in the case, does that
 9 change your view at all?
 10 A. I think you're getting into legal issues
 11 that -- I mean, for me, Marvel is a bunch of claim
 12 holders, and so I'm thinking about this from the
 13 perspective of the claim holders.
 14 Q. Okay.
 15 A. I think I've said that before.
 16 Q. Okay. So when I say things like: If
 17 Marvel -- is the entity is the plaintiff, is it
 18 that you -- you're unable to think about it that
 19 way, or you just haven't thought about it that
 20 way? I'm not --
 21 A. Well, to me, the entity is the claim
 22 holders of Marvel.
 23 Q. Yes. You've said that.
 24 A. Right.
 25 Q. That's the predicate for all of your

22 (Pages 82 to 85)

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1 Robert W. Holthausen
 2 analysis.
 3 A. Right, that is the predicate for my
 4 analysis, right.
 5 Q. So when I now tell you to assume that
 6 the plaintiff in the case is Marvel Entertainment,
 7 I guess my question -- my question is: Does that
 8 alter your analysis? And I know that you looked
 9 at it a different way. I'm now saying: If you
 10 assume that Marvel Entertainment is the plaintiff,
 11 does that alter your analysis?
 12 A. Well, I don't -- I mean, I can't
 13 distinguish in my own mind, as I think about
 14 corporations and stuff -- I mean, you must be
 15 doing something legal. Okay? But from an
 16 economist' perspective, it's the claim holders of
 17 the organization. So I don't understand. I mean,
 18 you must be going down some legal path that --
 19 some nuance that doesn't mean anything to me as an
 20 economist.
 21 Q. So there's no effect on your thinking if
 22 Marvel Entertainment is the plaintiff in the case?
 23 A. Correct, because I think about it as the
 24 claim holders.
 25 Q. Okay. And all the choices that were

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 2 available to all those claim holders, would they
 3 be available to Marvel Entertainment?
 4 A. I've just said that I think about Marvel
 5 Entertainment as the claim holders.
 6 Q. Okay. When you were explaining the
 7 economic underpinning of how you thought about it,
 8 you were explaining to me that claim holders of
 9 Marvel had choices to make.
 10 A. Correct.
 11 Q. And I'm now saying: If Marvel the
 12 entity, which is indifferent as to who its claim
 13 holders are -- it doesn't care whether Joe Smith
 14 or Jack Jones or Jane Doe is the shareholder or
 15 debt holder, it's indifferent, so the movement
 16 among its claim holders who have choices to make
 17 is a matter of economic indifference to Marvel.
 18 It's just there. Does that difference in the
 19 economic underpinning make a difference to you in
 20 forming your opinions?
 21 MR. ALLINGHAM: Object to the form of
 22 the question.
 23 A. Well, for me, I always think about it
 24 from the claim holders' perspective. I have not
 25 done -- I have not thought about this from this

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 2 perspective.
 3 Q. Okay. Professor Holthausen, would you
 4 please take a look at paragraph 8 of your report,
 5 marked as Holthausen Exhibit 1?
 6 A. Uh-huh.
 7 Q. Do you see in the very first sentence
 8 you mention that -- or you say that "Mr. Baliban's
 9 measure is incorrect because he assumes that it
 10 was certain that Marvel would experience financial
 11 distress"?
 12 A. Correct.
 13 Q. Okay. You see that?
 14 A. Uh-huh.
 15 Q. Do you dispute whether, after the
 16 issuance of the Marvel parent and Marvel III
 17 notes, Marvel, in fact, experienced financial
 18 distress?
 19 A. I'm just -- all I'm saying in this
 20 sentence is that he assumes that it was certain
 21 that they would experience financial distress, and
 22 I don't believe that to be correct.
 23 Q. I understand that. I'm just -- we may
 24 have actually covered this before, and I'm just
 25 not remembering correctly. But are you disputing

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 2 whether, as a matter of historical fact, Marvel
 3 experienced financial distress?
 4 A. No.
 5 Q. And is it your opinion that it would be
 6 incorrect for Mr. Baliban to observe, as a matter
 7 of historical fact, whether Marvel experienced
 8 financial distress?
 9 A. Is it -- that question doesn't mean
 10 anything to me. You asked me if it was incorrect
 11 to observe it. I don't know what you're getting
 12 at.
 13 Q. Oh, okay. In doing a damages analysis
 14 of the harm to Marvel from the indenture
 15 covenants, is it inappropriate or incorrect or
 16 whatever term you want -- whatever pejorative you
 17 want to apply for Mr. Baliban to take into account
 18 in forming his opinion as to the actual damages
 19 suffered by Marvel whether Marvel sustained
 20 financial distress as a result of the indenture
 21 covenants?
 22 MR. ALLINGHAM: With respect, I object
 23 to the form of the question, which, I think, is
 24 asking the witness to design his own question.
 25 MR. GOLDWATER: I'm not sure what that

23 (Pages 86 to 89)

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 2 means.
 3 MR. ALLINGHAM: You asked him to use
 4 whatever pejorative he wanted to use.
 5 MR. GOLDWATER: I don't need an
 6 explanation. I'll live with the objection. I'll
 7 just restate it.
 8 Q. Why do you say Mr. Baliban's measure is
 9 incorrect in your paragraph 8?
 10 A. Because he assumes that the financial
 11 distress is certain. I've already argued in
 12 paragraph 7 that it's -- we want to measure the
 13 incremental expected costs of financial distress,
 14 and he's just assuming that it's certain it's
 15 going to happen.
 16 Q. Okay. Do you -- is it your belief that
 17 Mr. Baliban had to make an assumption about
 18 whether Marvel would experience financial
 19 distress?
 20 A. I don't know what Mr. Baliban had to do.
 21 Q. If you are able to observe what happened
 22 as a matter of historical fact, why would you not
 23 take that data into account in an analysis of
 24 actual damages?
 25 A. Because, as I've said, what we want to

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 2 measure is, we want to measure what the expected
 3 impact of these indenture covenants was at the
 4 time that they were issued. And to assume with
 5 certainty that -- to observe that Marvel goes --
 6 has -- experiences financial distress and to
 7 estimate what those financial distress costs were,
 8 assumes, A, at the time the indenture company
 9 notes were issued that it was certain that they
 10 were going to do it and, B, that the financial
 11 distress was solely caused by the indenture
 12 covenant agreements, and neither of those is true.
 13 It was neither certain, and you can't say that it
 14 was solely caused.
 15 Q. Is it your opinion that an economist
 16 should limit an analysis of damages to changes in
 17 probabilities of harm rather than looking at
 18 whether actual harm was actually sustained?
 19 A. In this particular case, I think it's
 20 appropriate to think about: What is the expected
 21 cost of financial distress at the time the
 22 indenture company notes were issued?
 23 Q. And is it inappropriate to look at
 24 whether harm actually was sustained?
 25 A. I think it's inappropriate because I

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 2 believe that the claim holders had choices.
 3 Q. Is there any other economic principle or
 4 economic evidence that supports your view that
 5 damages should be limited to changes in
 6 probabilities beyond what you've told me about the
 7 choices available to claim holders of Marvel?
 8 MR. ALLINGHAM: I object to the form of
 9 the question.
 10 A. I didn't understand the question.
 11 Q. Is there any economic principle that
 12 supports -- that supports your view that damages
 13 should be limited to changes in probabilities of
 14 harm as distinguished from actual harm --
 15 MR. ALLINGHAM: Objection.
 16 Q. -- beyond what you've already told me?
 17 MR. ALLINGHAM: I object to the form of
 18 the question, which I think is the same question.
 19 MR. GOLDWATER: Well, at least I got
 20 that right.
 21 A. Beyond what I've already told you?
 22 Q. Yes.
 23 A. I don't know. It's an awfully broad
 24 question. Off the top of my head, I think what I
 25 have told you is why I think it's the right way to

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 2 do it. Whether there are other rationales for
 3 doing it, I'm not sure I thought about all the
 4 possibilities.
 5 Q. Okay. You mention a little further down
 6 in paragraph 8 of your report, marked as
 7 Holthausen Exhibit 1 --
 8 A. Uh-huh.
 9 Q. -- that "Marvel was not a highly
 10 leveraged company at the time that the holding
 11 company notes were issued."
 12 Do you see that?
 13 A. Correct.
 14 Q. And what is your criteria for
 15 determining whether Marvel was or wasn't highly
 16 leveraged?
 17 A. Oh, I was just comparing it to the HLTs
 18 that were in the Andrade and Kaplan study. I
 19 don't believe Marvel was nearly as highly levered
 20 back then as the firms that were in the Andrade
 21 and Kaplan study.
 22 Q. On an absolute basis?
 23 A. Yeah.
 24 Q. Okay. And would you agree that
 25 companies with characteristics comparable to

24 (Pages 90 to 93)

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 2 Marvel would be an appropriate basis of comparison
 3 in determining whether or not Marvel was highly
 4 leveraged?
 5 A. Say that again.
 6 Q. Sure. Would you agree that companies
 7 with characteristics comparable to Marvel would be
 8 an appropriate basis of comparison in determining
 9 whether Marvel was highly leveraged?
 10 A. I mean, you can look at comparable
 11 companies, and you can see what the relative
 12 magnitudes of the leverage are.
 13 Q. Yes. And would that be an appropriate
 14 basis of comparison for a determination about
 15 whether Marvel was highly leveraged or not?
 16 A. It would be a statement about highly
 17 leverage relative to the comparable companies.
 18 Whether it's highly leverage relative to what its
 19 debt capacity is, that may or may not answer the
 20 question.
 21 Q. Did you do any analysis of Marvel's
 22 leverage compared to companies with
 23 characteristics comparable to Marvel?
 24 A. No.
 25 Q. And are you offering an opinion as to

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 2 number, multiply it by the value of the firm, and
 3 that's the damages associated with the indenture
 4 covenants.
 5 Q. And is that incorrect?
 6 A. Yes.
 7 Q. Why is that incorrect?
 8 A. It's incorrect because it assumes that
 9 the financial distress was solely caused by the
 10 indenture covenants.
 11 Q. How is it relevant that the
 12 determination of the extent of damages whether the
 13 indenture covenants were the sole cause of
 14 financial distress or one out of two or three
 15 causes of financial distress?
 16 A. Well, I would -- you know, from an
 17 economic perspective, you would want to think
 18 about: How did the issuance of the indenture
 19 covenants affect the likelihood that financial
 20 distress would occur? because Marvel may have --
 21 let's suppose the indenture covenants never, ever
 22 were issued. It's still possible that Marvel
 23 would have experienced financial distress. So if
 24 you want to figure out what the effect or the
 25 impact or the damage of the indenture covenants

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 2 whether Marvel's capital structure reflected a
 3 debt-to-equity ratio that was higher than
 4 comparable companies?
 5 A. No, I'm not.
 6 Q. Okay. Would you please take a look at
 7 paragraph 9 of Holthausen Exhibit 1?
 8 A. Uh-huh.
 9 Q. Do you see that in the first sentence
 10 there you say that "Mr. Baliban's measure is
 11 incorrect because it assumes that Marvel's
 12 financial distress was caused solely by the
 13 indenture covenants"?
 14 A. Correct.
 15 Q. What leads you to believe that
 16 Mr. Baliban was making such an assumption?
 17 A. Well, it's the form of his calculation
 18 for determining damages associated with the
 19 indenture covenants because he just takes the
 20 20 percent estimate from Andrade and Kaplan and
 21 multiplies it by the value of the firm when he's
 22 applying the Andrade and Kaplan study. And so
 23 basically he's presuming in assessing damages
 24 associated with the issuance of the indenture
 25 covenants that you can take the financial distress

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 2 are, you have to try to extract from the
 3 likelihood that Marvel might have experienced
 4 financial distress, absent those indenture
 5 covenants.
 6 Q. So this goes back to your view that the
 7 correct measure of damages should be based on the
 8 probability of financial distress rather than
 9 whether Marvel actually sustained financial
 10 distress?
 11 A. Yes, absolutely, right.
 12 Q. Okay. And whether or not there were
 13 other causes of Marvel's financial distress
 14 besides the indenture covenants, are you
 15 expressing an opinion on whether the indenture
 16 covenants were at least a cause of financial
 17 distress?
 18 MR. ALLINGHAM: I object. This is asked
 19 and answered. We've been through this five times,
 20 I think. Haven't you asked that question half a
 21 dozen times?
 22 MR. GOLDWATER: I don't know. I'm
 23 honestly trying to do my best here. And I
 24 apologize if I covered it before. I don't
 25 recollect one way or another.

25 (Pages 94 to 97)

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 2 Q. But are you expressing -- if you know
 3 the answer, please tell me because I don't know
 4 it. Are you expressing an opinion on whether the
 5 indenture covenants were a cause of financial
 6 distress whether or not it was the sole cause?
 7 A. In this report --
 8 Q. Correct.
 9 A. -- I've been asked to calculate or to
 10 comment on the analysis that Mr. Baliban did and
 11 to assume that Marvel was constrained by the
 12 indenture covenants, and then to calculate what
 13 the increase in the probability was of -- the
 14 increase in the probability of financial distress
 15 was associated with the indenture covenants.
 16 THE REPORTER: With the indenture?
 17 THE WITNESS: With the indenture
 18 covenants. Sorry.
 19 Q. So it did not encompass whether the
 20 indenture covenants were a cause of financial
 21 distress?, if I'm understanding you.
 22 A. My damage calculation makes an
 23 assumption that, in fact, the indenture covenants
 24 cause Marvel to take on more notes. I was asked
 25 to make that assumption. Okay? And so when I

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 2 actually do the damage calculation, the damage
 3 calculation assumes that Marvel became more highly
 4 levered because of the indenture covenants.
 5 Q. Okay. I hear you. In the last sentence
 6 of paragraph 9 of your report, which is marked as
 7 Holthausen Exhibit 1, you have a sentence which
 8 says, in part, that "Mr. Baliban does not attempt
 9 to apportion the economic harm between the effect
 10 of the holding company notes and the effect of
 11 Marvel's capital structure decisions, absent the
 12 holding company notes."
 13 Do you see that?
 14 A. Uh-huh.
 15 Q. Okay. What economic harm are you
 16 referring to? Is that the economic harm from
 17 financial distress?
 18 A. Financial distress, yes, right.
 19 Q. And what do you mean by "Marvel's
 20 capital structure decisions, absent the holding
 21 company notes"?
 22 A. So in other words, Marvel was already a
 23 levered company prior to the issuance of the
 24 holding company notes. Because it had leverage in
 25 its capital structure, it's possible that it would

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 2 have experienced financial distress even if the
 3 holding company notes hadn't been issued.
 4 Q. Okay. Is it your view that Mr. Baliban
 5 should have tried to determine what Marvel's
 6 capital structure would have been, absent the
 7 holding company notes?
 8 A. It's my view that an assessment of
 9 damages would have to consider the fact that
 10 Marvel could have experienced financial distress
 11 without the holding company notes, and then -- and
 12 you would have to take that into consideration in
 13 figuring out what the damages were associated with
 14 the issuance of the holding company notes.
 15 THE VIDEOGRAPHER: Okay. I have to
 16 change the tapes. This concludes tape No. 1 in
 17 the videotape deposition of Robert Holthausen.
 18 The time now is 12:12 p.m. We're going off the
 19 record.
 20 (There is a recess taken.)
 21 THE VIDEOGRAPHER: This is the beginning
 22 of tape No. 2 in the videotape deposition of
 23 Robert Holthausen. The time now is 12:24 p.m.,
 24 and we're back on the record.
 25 BY MR. GOLDWATER:

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 2 Q. Professor Holthausen, just to reorient
 3 you, we're talking about that sentence, the last
 4 sentence of paragraph 9 of Holthausen Exhibit 1.
 5 A. Yes.
 6 Q. In the absence of the holding company
 7 notes, would you expect Marvel's capital structure
 8 to be a cause of financial distress?
 9 A. Well, it would depend upon the capital
 10 structure that Marvel chose to take on. And
 11 depending upon how much debt was in that capital
 12 structure, it could affect the likelihood of
 13 financial distress.
 14 Q. Okay. And have you done any analysis of
 15 what Marvel's capital structure would have been,
 16 absent the holding company notes?
 17 A. The analysis that I did assumed that
 18 Marvel's capital structure was what it was prior
 19 to the issuance of the holding company notes.
 20 Q. And -- okay. So that wasn't a
 21 hypothetical -- that wasn't you trying to imagine
 22 a world in which there were no holding company
 23 notes? That was you carrying forward the status
 24 quo right before the holding company notes?
 25 A. Correct.

26 (Pages 98 to 101)